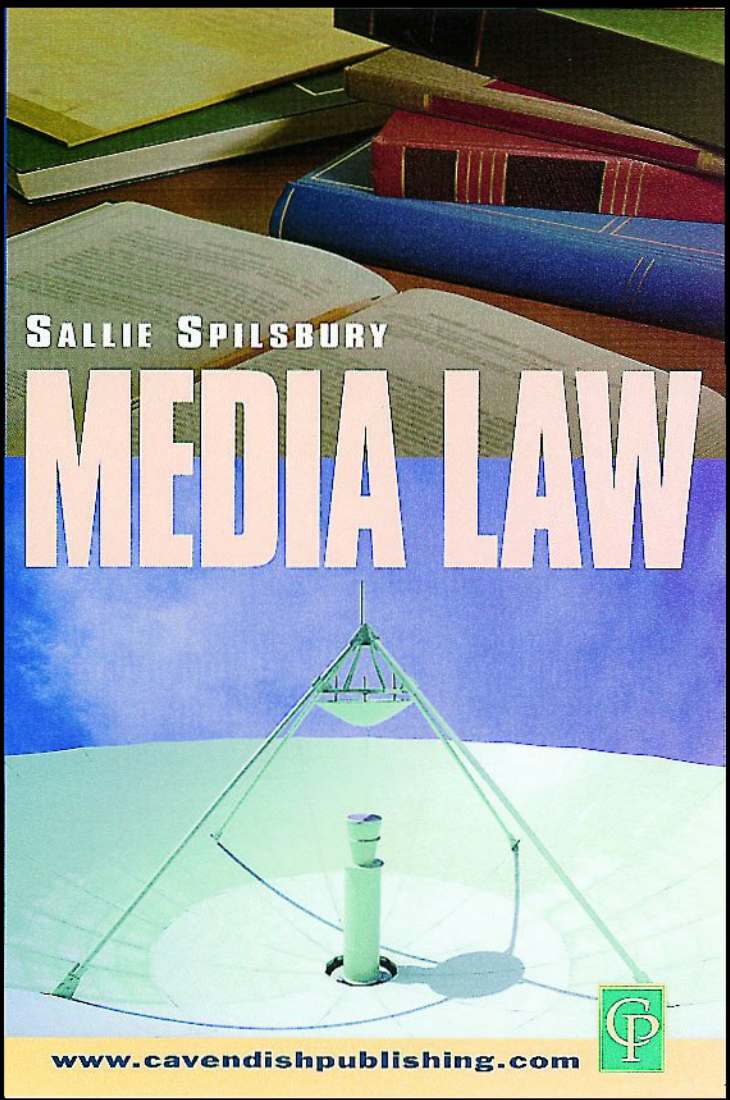
SALLIE SPILSBURY
MEDIA LAW
www.cavendishpublishing.com

MORALITY AND THE MEDIA: OBSCENITY, INDECENCY, BLASPHEMY AND SEDITION

> Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries, who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved.[1]

OBSCENITY

The law relating to obscenity is governed by the Obscene Publications Act 1959.[2] The long title of the Act describes itself as:

> An Act to amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography.

The Act was intended to provide safeguards for the publication of serious literary, artistic, scientific or scholarly work, whilst at the same time facilitating the suppression of hard pornography.

The Act provides for a number of *criminal offences*. The relevant sections of the Act are in the following terms:

Section 2

2 Prohibition of publication of obscene matter.

(1) Subject as hereinafter provided, any person who, whether for gain or not, publishes an obscene article [or who has an obscene publication for publication for gain (whether gain to himself or gain to another)][3] shall be liable:

(a) on summary conviction to a fine not exceeding £5,000 or to imprisonment for a term not exceeding six months;

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding three years or both.

1 Lord Morris in *Shaw v DPP* [1962] AC 220, p 292.

2 Plays are governed by the Theatres Act 1968. The same test for obscenity (see below) will apply as under the Obscene Publications Act 1959.

3 Added by the Obscene Publications Act 1964, s 1(1).

'Publication' is defined broadly by s 1(3) of the Act as distribution, circulation, selling, letting on hire, giving, lending, offering for sale or offering for letting on hire.

Where the article contains material to be looked at, or a record, publication means showing, playing or projecting it. Where the material is stored electronically, it means transmitting the data. Making images or text available over the internet constitutes 'publication'. Under s 162 of the Broadcasting Act 1990, the broadcasting industries (television and radio) were made subject to the provisions of the Act (having both previously been excluded).

'Article' does not simply encompass the written word. It covers any description of article containing or embodying matter to be read or looked at or both, any sound record and any film or other record of a picture or pictures.[4] By way of example, in *AG's Reference (No 5 of 1980),*[5] a video cassette was held to be an 'article' and a cinema showing video films was held to be 'publishing' the cassette by playing or projecting the images. In 1991, proceedings were commenced against Island Records in respect of a recording by the rap artists Niggaz With Attitude.

Publication also extends to anything which is intended to be used, either alone or as one of a set, for the reproduction or manufacture of articles, for example photographic negatives.[6]

The consent of the Director of Public Prosecutions is required before proceedings may be instituted in respect of moving picture films of a width of not more than 16 mm where the publication takes place in the course of a film exhibition[7] and in respect of articles included in a cable programme service.[8]

Section 3

Section 3 of the Act imposes summary liability on articles which are kept for publication for gain. The section is in the following terms:

> 3 Powers of search and seizure.
>
> (1) If a justice of the peace is satisfied on oath that there is reasonable ground for suspecting that, in any premises in the petty sessions area for which he acts, or on any stall or vehicle in that area … obscene articles are, or are from time to time, kept for publication for gain, the justice may issue a warrant empowering any constable to enter (if need be, by force) and search the premises, or to search the stall or vehicle, and to seize and remove any articles found therein or thereon which

4 Obscene Publications Act 1959, s 1(2).

5 *AG's Reference (No 5 of 1980)* [1980] 3 All ER 816.

6 Obscene Publications Act 1964, s 2(1).

7 Obscene Publications Act 1959, s 2(3A), as amended by the Cinemas Act 1985.

8 Cable and Broadcasting Act 1984, Sched 5.

the constable has reason to believe to be obscene articles and to be kept for publication for gain …

(2) Any articles seized under sub-s (1) of this section shall be brought before a justice of the peace acting for the same petty sessions area as the justice who issued the warrant, and the justice before whom the articles are brought may thereupon issue a summons to the occupier of the premises or, as the case may be, the user of the stall or vehicle to appear on a day specified in the summons before a magistrates' court for that petty sessions area to show cause why the articles or any of them should not be forfeited [the owner, author or maker of the articles or any person through whose hands they have passed before being seized shall also be entitled to appear on the day specified in the summons to make such representations];[9] and if the court is satisfied, as respects any of the articles, that at the time when they were seized they were obscene articles kept for publication for gain, the court shall order those articles to be forfeited.

The onus is on the defendant to show good cause why the article(s) should not be forfeited. A justice of the peace may not issue a warrant except on information laid by or on behalf of the Director of Public Prosecutions or by a constable.[10]

This section is not restricted to articles intended for publication in England. The court is entitled to seize an obscene article kept for publication for gain even where the article is kept in England for publication outside the jurisdiction of the English courts.[11]

The meaning of 'obscene'

Section 1(1) of the Act sets out the test for obscenity. It is in the following terms:

> For the purposes of this Act an article shall be deemed to be obscene if its effects or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

The following points should be noted in relation to the test:

(a) the article must have *a tendency* to deprave and corrupt. No actual depravity or corruption need be proved to bring a successful prosecution;

(b) the intention of the publisher will not be relevant to the issue of whether the article is obscene;

9 Obscene Publications Act 1959, s 3(4).

10 Criminal Justice Act 1967, s 25.

11 *Gold Star Publications Ltd v DPP* [1981] 2 All ER 257, HL.

(c) 'depravity' and 'corruption' are not defined by the Act. In *R v Calder and Boyars Ltd*,[12] the judge at first instance directed the jury to consider the words in their ordinary everyday meaning – an approach endorsed by the Court of Appeal. On that basis, the essence of the test for obscenity is a tendency to cause moral corruption: 'to make morally bad; to pervert or corrupt morally'.[13]

In *Knuller v DPP*,[14] Lord Reid observed that the Act 'appears to use the words 'deprave' and 'corrupt' as synonymous as I think they are'. He also observed that 'to deprave and corrupt does not merely mean to lead astray morally'. A distinction must therefore be drawn between leading someone astray morally (not obscene) and making them morally bad (obscene). This is a fine line to draw, and one which is difficult to apply in practice. In the *Knuller* case, Lord Reid observed: 'We may regret that we live in a permissive society, but I doubt whether even the most staunch defender of a better age would maintain that all or even most of those who have at one time or in one way or another been led astray morally have thereby become depraved or corrupt.';[15]

(d) depravity and corruption are not to be confused with shock, repulsion or disgust. A shocking or a repulsive image or description will not necessarily corrupt a person. In fact, it is likely to have the opposite effect by deterring the reader or viewer from the activity in question. This point is considered below in relation to the aversion defence;

(e) depravity and corruption do not necessarily involve the encouragement of depraved *conduct*. The effect on the *minds* or *emotions* of the likely audience for the article may in itself render an article obscene. In a case involving the publication of hard pornography, it was not necessary to prove that physical sexual activity resulted from exposure to the material. The fact that the material would suggest 'thoughts of a most impure and libidinous character' was sufficient;[16]

(f) where the article in question consists of a number of distinct items (such as a magazine), s 1 of the Act provides that each item must be considered on an individual basis. If the test shows that any one of the distinct items is obscene, then that will render the whole article (for example, the whole magazine) obscene.[17]

12 *R v Calder and Boyars Ltd* [1968] 3 All ER 644.

13 *Ibid*, p 646.

14 *Knuller v DPP* [1973] AC 435, p 456.

15 *Ibid*.

16 *Whyte v DPP* [1972] 3 All ER 12, *per* Lord Pearson, p 22.

17 *R v Anderson* [1971] 3 All ER 1152.

Subject to that point, each article or individual item must be looked at *as a whole*. It is not permissible to isolate one particular part of an article and to take it out of its context;

(g) despite the reference in the long title of the Act to pornography, there is nothing in the Act to confine depravity and corruption to sexual matters. In *Calder Ltd v Powell*,[18] a book which described the imaginary life of a drug addict in New York was held to be obscene on the ground that it had a tendency to encourage its readers to experiment with drugs. Articles which encourage brutal violence might also have a tendency to deprave and corrupt. The width and vagueness of the definition could at least in theory encompass the fostering of attitudes which the court or members of the jury might find to be morally distasteful – perhaps misogynistic or homophobic attitudes;

(h) whether an article is obscene is a question of *fact* (for the jury where the case is tried on indictment). Expert evidence (for example, psychological or sociological evidence) will only be allowed to assist the court on this question in very exceptional circumstances;

(i) it is the potential effect of the article that matters. An article is not inherently obscene in isolation from its likely audience. The 'deprave and corrupt' test should be directed towards those people who are likely to read, see or hear the material in question.[19] It does not have to be judged against society as a whole or against particularly vulnerable or sensitive people, unless they are part of the likely readers, viewers or listeners. It is, therefore, incorrect to invoke the standards of the average man or woman when applying the test for obscenity. When applying the test of obscenity, the first step is to identify the likely audience. They are the standard against which the test for obscenity will be judged. Where cases are tried on indictment, the jury must put themselves in the shoes of that audience.

This means that the question whether an article is obscene depends also on what is being or is going to be done with it.

Example

A medical treatise which depicts sexual acts would not be obscene if its readership were restricted to doctors or scientists in their professional capacity. If the same material were published to the general public, it might be classed as obscene;

(j) the article must have a tendency to deprave and corrupt *a significant proportion* of those people who would be likely to read, see or hear the material.[20] What amounts to a significant proportion is a matter for the

18 *Calder Ltd v Powell* [1965] 1 QB 509.

19 *DPP v Whyte* [1972] AC 849.

20 *R v Calder and Boyars Ltd* [1968] 3 All ER 644.

jury.[21] It is not necessarily synonymous with a substantial proportion. In *DPP v Whyte*, Lord Cross described 'significant proportion' as being a proportion which is 'not numerically negligible, but which may be much less than half';[22]

(k) members of the audience who are already depraved or corrupted may become more so. The test does not necessarily revolve around the corruption of the wholly innocent. In *DPP v Whyte*,[23] the defendant's bookshop sold pornographic books. The court found as a matter of fact that the majority of customers were men of middle age and upwards. Having identified the likely readership, the court had to decide whether the pornography had a tendency to deprave and corrupt a significant proportion of that readership. The justices had taken the view at the trial that there was no such tendency. A significant proportion of the readership were 'inadequate, pathetic, dirty-minded men, seeking cheap thrills – addicts to this type of material, whose morals were already in a state of depravity and corruption'. The readers being already depraved, the magistrates reasoned, the articles could have no tendency to cause further corruption. The House of Lords rejected this approach. The majority of the Law Lords expressed the view that the Act was not merely concerned with the once for all corruption of the wholly innocent. In Lord Wilberforce's view, '[the Act] equally protects the less innocent from further corruption, the addict from feeding or increasing his corruption'.[24] The articles were therefore capable of tending to deprave and corrupt a significant proportion of the likely readership.

Defences

Defences to the s 2 offence

Section 2(5) of the Act provides a defence to a distributor of obscene material who can prove that he had not examined the article in question and had no reasonable cause to suspect that it was obscene. A similar defence is provided for in Sched 15 of the Broadcasting Act 1990 in relation to cable or broadcast or radio material which the defendant did not know and had no reason to suspect would include material rendering him liable to be convicted of an offence.

21 *R v Calder and Boyars Ltd* [1968] 3 All ER 644.

22 *DPP v Whyte* [1972] 3 All ER 12, p 24.

23 *Ibid*.

24 *DPP v Whyte* [1972] AC 849.

The aversion defence – ss 2 and 3

Defendants often argue that an article does not have a tendency to deprave and corrupt because the effect of the article, rather than encouraging depraved thoughts or behaviour, would be to repel the reader, viewer or listener. Such a defence was summarised by Salmon LJ in *R v Calder and Boyars*, an appeal from prosecution for obscenity in respect of the novel *Last Exit to Brooklyn*. He said:[25]

> The defence was, however, that the book had no such tendency [to deprave and corrupt]; it gave a graphic description of the depths of depravity and degradation in which life was lived in Brooklyn … The only effect that it would produce in any but a minute lunatic fringe of readers would be horror, revulsion and pity; it was admittedly and intentionally disgusting, shocking and outrageous; it made the reader share in the horror it described and thereby so disgusted, shocked and outraged him that, being aware of the truth, he would do what he could to eradicate those evils and the conditions of modern society which so callously allowed them to exist. In short, according to the defence, instead of tending to encourage anyone to homosexuality, drug taking or senseless, brutal violence, it would have precisely the reverse effect.

The appeal court held that the trial judge had neglected to deal adequately with the aversion defence in his summing up. The conviction was accordingly quashed on the ground that, had the jury been properly directed, they might not have convicted.[26]

The public interest defence – ss 2 and 3

The Act provides a defence for offences under ss 2 and 3 of the Act where, despite the fact that an article has a tendency to deprave and corrupt, its publication may be said to be justified as being for the public good. The defence is contained in s 4 of the Act, which states as follows:

> A person shall not be convicted of an offence … if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.

The public good defence was extended to broadcasting by the Broadcasting Act 1990. The broadcasting defence is in the same terms as for non-broadcast media save that instead of the word 'art' the broadcasting defence refers to 'drama, opera, ballet or any other art'.

The onus is on the defendants to make out such a defence on the balance of probabilities.[27]

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25 *R v Calder and Boyars Ltd* [1968] 3 All ER 644, p 647.

26 The conviction for indecency was similarly overturned on appeal in *R v Anderson*.

27 *R v Calder and Boyars Ltd* [1968] 3 All ER 644, p 648.

Sub-section 2 of s 4 provides that expert evidence may be adduced on the literary, artistic, scientific or other merits of an article. However, the evidence must be confined to the inherent merits of the article.[28] As we have seen, expert evidence is not generally permitted on the question whether the article is obscene.

Section 4 has been interpreted restrictively to apply only to material which can be said to be of a 'high order'. For example, 'learning' has been held to mean 'a product of scholarship'. It does not extend to teaching or any form of education (such as sex education).[29] It is unlikely that 'literary' or 'artistic' is synonymous with mere entertainment value.

The words 'or other objects of public concern' which appear in s 4 do not include material which just happens to confer some benefit on the public. The objects must be conducive to the public good *and* of concern to members of the public in general before the section can be brought into play.[30] In *R v Staniforth,*[31] the defendant argued that pornographic material fell within the scope of the s 4 defence because it had a beneficial effect on those who are sexually repressed or 'deviant'. The Court of Appeal held that such material did not fall within s 4 because whatever beneficial effects the material had, they could not be said to be of general public concern. They were felt only by a minority of the public.

The interplay between ss 2 and 3 of the Act and s 4

In *R v Calder and Boyars,* the court considered the way in which the jury should approach the public good defence. Salmon LJ observed:[32]

> The proper direction on a defence under s 4 in a case such as the present is that the jury must consider on the one hand the number of readers they believe would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt and the nature of the depravity and corruption; on the other hand they should assess the strength of the literary, sociological or ethical merit which they consider the book to possess. They should then weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good … the jury must set the standards of what is acceptable, of what is for the public good in the age in which we live.

28 *R v Staniforth* [1976] 2 All ER 714.

29 *AG's Reference (No 3 of 1977)* [1978] 3 All ER 1166.

30 *R v Staniforth* [1976] 2 All ER 714.

31 *Ibid*.

32 *R v Calder and Boyars Ltd* [1968] 3 All ER 644, p 649.

INDECENCY OFFENCES

Common law

Conspiracy to corrupt public morals

Conspiracy to corrupt public morals is a criminal offence at common law. The offence was 'rediscovered' by the majority of a House of Lords in the case of *Shaw v DPP*,[33] which concerned the publication of a directory containing details and pictures of prostitutes (some of whom were shown as engaged in what were described as 'perverse practices'). Controversially, the majority of the House of Lords were of the view that the courts had residual powers to superintend offences which were prejudicial to the welfare of the public where Parliament had not expressly legislated for them. This residual power took the form of a revival of the common law defence of conspiracy to corrupt public morals.

A conspiracy consists of agreeing or acting in concert to do an unlawful act or a lawful act by unlawful means. The essence of the offence is the *agreement* to corrupt rather than the question whether corruption actually occurred.

The decision as to what type of publication might corrupt public morals is broad and subjective. The majority of the House of Lords in the *Shaw* case felt that the jury should be the final arbiter on the issue. In his dissenting speech in the *Shaw* case, Lord Reid disagreed with this approach and observed that 'the law will be whatever any jury happen to think it ought to be, and this branch of the law will have lost all the certainty which we rightly prize in other branches of our law'. In recognition of the uncertain scope of the offence[34] the House of Lords subsequently confined the offence to activities 'reasonably analogous' to conduct which have been successfully prosecuted as corrupting public morals in the past. The Solicitor General also assured Parliament that charges for corrupting public morals would not be brought in simply to circumvent the defences in the Obscene Publications Act 1959.[35] Where a prosecution essentially involves a consideration of whether an article is obscene, the prosecution ought to be brought under the Obscene Publications Act and not the common law.

The meaning of corruption

The House of Lords has emphasised that 'corrupt' has a strong meaning. In considering whether corruption has taken place, the jury should keep in mind both the current standards of ordinary decent people and also that 'corrupt'

33 *Shaw v DPP* [1961] 2 All ER 446.

34 *Knuller v DPP* [1973] AC 435.

35 *Hansard*, Vol 695, col 1212.

means more than simply leading someone morally astray.[36] Lord Simon referred to conduct which corrupts public morals as being suggestive of conduct which a jury might find destructive of the very fabric of society.[37]

In the *Knuller* case (which was decided in the early 1970s), a conviction for conspiracy to corrupt public morals was upheld in respect of advertisements in a magazine which invited readers to meet with the advertisers for the purpose of homosexual sex. It is a moot point whether a jury in the 21st century who are asked to consider a similar publication would come to the same conclusion. However, given that there are no universally accepted standards in today's society, this result cannot be predicted with any degree of certainty.

The conspiracy offence is clearly unsatisfactory. Its vagueness makes it difficult for the media to regulate their conduct. The yardstick will be the collective opinion of the jury, who must set the standards of what is acceptable. There is a real possibility that a law of such uncertain scope is incompatible with the European Convention on Human Rights, in that it cannot be said to be prescribed by law.[38] The validity of the offence may therefore be subject to challenge once the Human Rights Act comes into force.

Outraging public decency/conspiracy to outrage public decency

It is a criminal offence at common law to commit an act in public which amounts to an outrage of public decency (or to conspire to commit such an act). The rationale for the offence is that members of the public ought not to be exposed to material which will outrage them or leave them disgusted by what they read or see.[39] It is not necessary to show that the act causes actual disgust or outrage, simply that it is calculated (in the sense of likely to) to have that effect.

In the *Knuller* case, Lord Simon emphasised that 'outrage' is a strong word and observed that outraging public decency 'goes considerably beyond offending the susceptibilities of, or even shocking, reasonable people'.[40] The standards of decency which the jury should apply in deciding whether the offence has been committed will be those which are prevalent in contemporary society.

The material which is complained of must be exposed to the public in the sense that it is possible that it could have been seen by more than one person (even if, as a matter of fact, only one person did see it). The offence may be

36 [1973] AC 435, p 457.

37 *Knuller v DPP* [1973] AC 435, p 491.

38 The meaning of 'prescribed by law' is considered in Chapter 1.

39 Lord Reid in *Knuller v DPP* [1973] AC 435, p 457.

40 *Ibid*, p 495.

committed even where the outrageous material is hidden from public view (for example, in the inside pages of a magazine) if the public is expressly or impliedly invited to see it (for example, to open up the magazine).[41]

There is no requirement that the prosecution must show an intention to cause outrage on the part of the accused. All that needs to be proved in order to establish the offence is that the accused has deliberately made the material public.[42]

Like the offence of corrupting public morals, the generalised nature of the outraging public decency offence gives the court a residual ability to widen the scope of the offence to fit the circumstances of the case before it. The notion of outrage is equated with the opinion of the jury, leading to a lack of clarity.

The outraging public decency offence may be vulnerable to challenges once the Human Rights Act comes into force on the ground that it cannot really be said that its scope is prescribed by law.

Circumventing the safeguards in the Obscene Publications Act

Section 2(4) of the Obscene Publications Act provides that, where an offence essentially involves the question whether material is obscene, prosecutions ought to be brought under the Act.[43] The objective of s 2(4) was to ensure that a person who is accused of publishing an obscene article should be able to avail himself of the protections from arbitrary prosecution contained in the Act – most significantly the public good defence contained in s 4 and the rule that an article must be construed as a whole when deciding whether it has a tendency to deprave and corrupt.[44] Prosecutions should not be brought under the common law offences of corrupting public morals or outraging public decency simply as a way of circumventing the Act's provisions.

Section 2(4) was interpreted restrictively in *R v Gibson*,[45] where the defendants were convicted under the common law for outraging public decency by exhibiting in a public gallery a pair of earrings consisting of freeze dried human foetuses. The Court of Appeal expressed the view that the Obscene Publications Act is only relevant to prosecutions where the prosecution concerns the question whether an article was obscene in the sense that the word is used in the Act, that is, whether the article tends to deprave and corrupt a significant proportion of its likely audience. There was no suggestion in the *Gibson* case that the earrings had any such tendency.

41 *Knuller v DPP* [1973] AC 435, p 495.

42 *R v Gibson* [1990] 2 QB 619.

43 Obscene Publications Act 1959, s 2(4).

44 *Knuller v DPP* [1973] AC 435, p 456.

45 *R v Gibson* [1990] 2 QB 619.

It was not, therefore, contrary to s 2(4) of the Act's provisions to prosecute the accused under the common law offence of outraging public decency rather than under the Obscene Publications Act.

In any event, the Court of Appeal said, it was unlikely that the s 4 defence of public good could ever arise in respect of material which caused outrage to public decency. In other words, even if the public good defence had been available to the defendants in the *Gibson* case, it would not have assisted them, according to the court. This last point was *obiter*. The actual decision as to whether the public good defence would have availed the defendant had it been available to them would have been a question of fact for the jury.

In the wake of the *Gibson* decision, it would seem that prosecutions might be brought against material which causes public outrage provided that no tendency to deprave or corrupt is alleged. The accused will not then be able to avail himself of the equivalent of the public good defence, nor will the jury have to consider the article as a whole in deciding whether the material is likely to cause public outrage.

Statutory indecency offences

Section 11 of the Post Office Act 1953 – indecent material sent by post

It is a criminal offence to send, attempt to send or procure to be sent a postal package which encloses any indecent or obscene print, painting, photograph, lithograph, engraving, cinematograph film, book, card or written communication or any other indecent or obscene article. It is also an offence to carry out the above activities where the package has, on its cover, any words, marks or design which are grossly offensive or of an indecent or obscene character.

A defendant found guilty of the above offences is liable on conviction on indictment to imprisonment for a term not exceeding 12 months or on summary conviction to a fine not exceeding the prescribed sum.

The Act does not define what is meant by the terms 'obscene' or 'indecent'. For the purposes of the Act, both terms bear their everyday meaning (so that 'obscene' does not bear the technical meaning provided for in the Obscene Publications Act – there is no requirement that the material must have a tendency to deprave and corrupt). The test of indecency (and by analogy obscenity) is an objective one.[46] The character of the addressee is immaterial. It is for the jury to determine the current standards against which to judge whether the article is indecent or obscene.[47] This is a question of fact. No expert evidence will be permitted to help the jury with their task.

46 *R v Straker* [1965] Crim LR 239.

47 *R v Stamford* [1972] 2 QB 391.

There is no equivalent to the s 4 public good offence under the Obscene Publications Act.

Unsolicited material

It is an offence under the Unsolicited Goods and Services Act 1971 to send or cause to be sent to another person any book, magazine or leaflet or advertising material for any such article (whether or not the advertising material depicts or describes human sexual techniques),[48] which he knows or ought reasonably to know is unsolicited and which describes or illustrates human sexual techniques. The offence carries a maximum penalty on summary conviction of a fine not exceeding level 5 on the standard scale.

Proceedings for such an offence can only be instigated with the consent of the Director of Public Prosecutions.

Section 49 of the British Telecommunications Act 1981 – sending indecent, obscene or false messages by telephone

It is a criminal offence to send a message or other material which is grossly offensive or of an indecent, obscene or menacing character by means of a public telecommunications system (presumably including fax transmissions and e-mail). This section does not apply to anything done in the course of providing a programme service within the meaning of part 1 of the Broadcasting Act 1990. 'Obscene' and 'indecent' are to be interpreted in the same way as would apply under the Post Office Act. A person found guilty under this Act is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Section 1 of the Protection of Children Act 1978

It is an offence for a person to:

- take or to permit to be taken any indecent photograph of a child; or
- distribute or to show such indecent photographs; or
- have in his possession such indecent photographs with a view to their being distributed or shown by the defendant or others; or
- publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or intends to do so.

48 *DPP v Beate Uhse (UK) Ltd* [1974] 1 All ER 753.

'Child' means a person under the age of 16.[49] The term 'photograph' includes the negative of the picture. It also includes an indecent film and copies of an indecent photograph or film.[50]

'Indecent' is not defined by the Act. The Court of Appeal has adopted the standard of 'recognised standards of propriety'.[51] It is for the jury to determine whether the photograph is indecent on the basis of the photographs themselves – evidence as to the photographer's intentions in taking the photograph will not be relevant to the question whether the photograph was indecent.[52]

In order to be guilty of taking an indecent photograph, the defendant must deliberately and intentionally have taken the photograph and to have deliberately included the indecent subject matter.[53] The Court of Appeal indicated in *R v Graham-Kerr* that the correct approach for the jury to follow is first to satisfy themselves that the picture was taken deliberately and intentionally and that the offending material had not been inadvertently included, and secondly to determine whether the photograph is indecent, by reference to the recognised standards of propriety.

There is a defence to the charge of distribution or showing of an indecent photograph where the defendant can prove that he had a legitimate reason for distributing or showing the photographs or having them in his possession with a view to distributing them or showing them or that he had not himself seen the photographs and did not know or have cause to suspect that they are indecent.[54]

Proceedings for the above offences can only be instituted with the consent of the Director of Public Prosecutions.[55]

Section 160 of the Criminal Justice Act 1988 – possession of indecent photographs of children

It is a criminal offence for a person to have any indecent photographs of a child in his possession. A person charged with this offence has a defence if he can prove:

- that he had a legitimate reason for having the photograph in his possession;

49 Protection of Children Act 1978, s 1(1)(a).

50 *Ibid*, s 7(1).

51 *R v Graham-Kerr* [1988] 1 WLR 1098. The formula was originally put forward in *R v Stamford* [1972] 2 QB 391.

52 *R v Graham-Kerr* [1988] 1 WLR 1098.

53 *Ibid.*

54 Protection of Children Act 1978, s 1(4).

55 *Ibid*, s 1(3).

- that he had not himself seen the photograph and did not know nor had any cause to suspect it to be indecent; or
- that the photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time.

No proceedings for this offence may be instituted without the consent of the Director of Public Prosecutions.[56]

The terms 'child' and 'photograph' bear the same meanings under the Criminal Justice Act as they do under the Protection of Children Act 1978.

A person shall be liable on summary conviction under this section to imprisonment for a term not exceeding six months or a fine not exceeding £5,000.

Indecent Displays (Control) Act 1981

It is an offence to display indecent matter in public or to cause or permit such a display. The Act is intended to restrict the 'public nuisance' element of indecent displays. It regulates the public display of indecent material rather than the nature of such material. The offence is punishable on indictment to imprisonment for a term not exceeding two years or a fine or to both or on summary conviction to a fine not exceeding the statutory maximum.

'Matter' includes anything capable of being displayed, excluding a human body or any part of a human body.[57] It extends to the written word as well as to pictures or other visual material. 'Public place' means any place to which the public have access (whether on payment or otherwise),[58] subject to certain exceptions, largely relating to sex shops where persons under the age of 18 are not permitted entry. Any matter which is displayed in or which is visible from a public place is deemed to be publicly displayed.[59] Magazine covers which can be seen in newsagents' shops could constitute an indecent display for the purposes of the Act.

The term 'indecent' is undefined.

Whilst the Act does not provide the equivalent of the Obscene Publications Act 'public good defence', there are a number of exceptions to this offence, most notably:

- matter included in a television programme service within the meaning of Pt 1 of the Broadcasting Act 1990;
- matter included in the display of an art gallery or museum and visible only from the gallery or museum;

56 Protection of Children Act, s 1(3), applied by Criminal Justice Act 1988, s 160(4).

57 Indecent Displays (Control) Act 1981, s 1(5).

58 *Ibid*, s 1(3).

59 *Ibid*, s 1(2).

- matter included in a performance of a play;
- matter included in certain types of film exhibition.

Video recordings

The distribution of video recordings is regulated by the Video Recordings Act 1984. The Act was intended to curb the distribution of 'video nasties' – home videos depicting violence and sexual activity which it was feared were being watched by children in their homes.

The Act provides for a system of classification of videos and prohibits the supply of unclassified videos. The classification is carried out by the British Board of Film Classification (BBFC) which certifies videos as being suitable for home viewing. Where a classification certificate is issued, it must state that the work is suitable for general viewing and unrestricted supply or that it is suitable for viewing only by persons above a specified age and that no recording should be supplied to a person under that age. There is a third type of classification under which works may only be supplied by licensed sex shops. In deciding whether to grant or refuse a certificate, the BBFC is required to have 'special regard to the likelihood of video works … being viewed in the home'.[60] In the wake of the James Bulger murder, where the trial judge referred to a potential connection between the murder by the two young accused and the fact that they had been exposed to videos of an adult nature, the criteria which the BBFC must have regard to were widened. Special regard must now also be had to 'any harm that may be caused to potential viewers or, through their behaviour, to society by the manner in which the work deals with: (a) criminal behaviour; (b) illegal drugs; (c) violent behaviour or incidents; (d) horrific behaviour or incidents; or (e) human sexual activity.[61]

Certain types of video work are exempt from the classification requirements (see below).

The Act defines a video recording as any disc, magnetic tape or other device capable of storing data electronically containing information by the use of which the whole or part of a video work may be produced.[62] A video work is defined as any series of visual images (with or without sound) produced electronically by the use of information contained on any disc, magnetic tape or any other device capable of storing data electronically and shown as a moving picture.[63]

60 Video Recordings Act 1984, s 4(1)(a).

61 Criminal Justice and Public Order Act 1994, s 90.

62 Video Recordings Act 1984, s 1(3).

63 *Ibid*, s 1(2).

A person who supplies or offers to supply a video recording containing a video work in respect of which there is no classification certificate issued is guilty of an offence and liable on summary conviction to a fine not exceeding £20,000, unless the supply is, or would if it took place be, an exempted supply or the video work is an exempted work. A video work is an exempted work if, taken as a whole, it is designed to inform, educate or instruct, is concerned with music, sport, religion or is a video game. However, such a work will not be exempt if to any significant extent it depicts the following:

- human sexual activity or acts of force or restraint associated with such activity (or is likely to any significant extent to stimulate or encourage such activity);
- mutilation or torture or other acts of gross violence towards humans or animals (or is likely to stimulate or encourage such activity);
- human genital organs or human urinary or excretory functions;
- techniques likely to be useful in the commission of offence; or
- criminal activity which is likely to any significant extent to stimulate or encourage the commission of offences.

It is a defence if the accused believed on reasonable grounds that the video work concerned or if the video recording contained more than one work to which the charge relates, was either an exempted work or a work in respect of which a classification certificate had been issued or that the supply was or would be an exempted supply.

Where a video recording contains a video work in respect of which no classification certificate has been issued, a person who has the recording in his possession for the purposes of supplying it is guilty of an offence and liable on summary conviction to a fine not exceeding £20,000 and imprisonment not exceeding six months, unless he has it in his possession for the purpose of a supply which, if it took place, would be an exempted supply or the video work is an exempted work. The offence is also triable on indictment carrying a maximum sentence of imprisonment of two years.

It is a defence to a charge of committing such an offence if the accused proves:

- that the accused believed on reasonable grounds that the video work concerned or if the video recording contained more than one work to which the charge relates each of those works was either an exempted work or a work in respect of which a classification certificate had been issued; or
- that the accused had the video recording in his possession for the purpose only of a supply which he believed on reasonable grounds would, if it took place, be an exempted supply; or

- that the accused did not intend to supply the video recording until a classification certificate had been issued in respect of the video work concerned.

BLASPHEMY (OR BLASPHEMOUS LIBEL)

Despite recommendations for its abolition, the common law of blasphemy (known in its permanent form as blasphemous libel) remains in being. Prosecutions have been rare in modern times. Nevertheless, the offence carries criminal liability and is something which the media lawyer cannot afford to regard as obsolete or archaic. The European Court of Human Rights has expressed itself to be willing to uphold restrictions on freedom of expression which have the objective of protecting religious feelings provided that they are prescribed by law and proportionate to the objective pursued.[64]

The offence was originally 'designed to safeguard the internal tranquillity of the kingdom'.[65] It fell within the jurisdiction of the ecclesiastical courts, but over time the secular courts came to share jurisdiction. Historically, the interests of the established Church and the State were so entwined that an attack on the former would of necessity sound in an attack on the latter. This historical association of the interests of Church and State has led to the anomalous position where the blasphemy law protects the established Church in England, but it will not extend the same protection to other religions or denominations.

The criteria for blasphemy

The attack

There is no comprehensive definition of blasphemy. The type of material held to be blasphemous has evolved over time. Under modern law, the mere denial of the truth of the Christian religion will not amount to blasphemy, nor will a temperate attack on Christianity. But there is a dividing line between moderate and reasoned criticism (which will not be blasphemous) and offensive treatment (which may be blasphemous). The test is whether the words at issue are likely to outrage and insult a Christian's religious feelings. In *R v Lemon*,[66] Lord Scarman quoted with approval the following passage from *Stephen's Digest of the Criminal Law*:[67]

64 *Wingrove v UK* (1996) 24 EHRR 1.

65 Lord Scarman in *R v Lemon* [1979] 1 All ER 898.

66 *R v Lemon* [1979] 1 All ER 898.

67 *Stephen's Digest of the Criminal Law*, 9th edn, 1950.

> Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, of the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves.

R v Lemon concerned a poem and drawing which appeared in an edition of *Gay News*. The poem and drawing purported to describe in detail certain sexual acts with the body of Christ immediately after his death and to ascribe homosexual practices to him during his lifetime. The publication was found to be blasphemous, on the basis that they were likely to outrage and insult a Christian's religious feelings.

The Law Commission has recommended the abolition of the blasphemy laws.[68] One of their reasons for doing so is the inherent uncertainty of the test for blasphemy. What might the tests of 'scurrilous', 'abusive' or 'insulting' cited with approval by the House of Lords extend to?

But in *Wingrove v UK*,[69] the European Court of Human Rights did not share the Law Commission's concerns. It was of the view that English blasphemy law was sufficiently prescribed by law to be a legitimate restriction on freedom of speech.

Mens rea

Blasphemy is a strict liability offence. This means that the defendant can be guilty of the offence even where it had no intention to vilify the Christian religion.

In order to secure a conviction for the offence of blasphemous libel, the prosecution must show the following:

(a) an intention on the part of the defendant to publish the material about which complaint is made; and

(b) that the material is in fact blasphemous.[70] This is *not* a subjective test – it is *not* dependent on the intention and motivation of the author.

In *R v Lemon*, the author of the poem in question was not permitted to give evidence about his intention in publishing the poem or the drawings. This evidence was held to be irrelevant to liability.

The Law Commission has criticised this aspect of the offence. It observed that someone holding profound religious beliefs who publishes material with

68 Law Commission, Working Paper No 79.

69 *Wingrove v UK* (1996) 24 EHRR 1.

70 *R v Lemon* [1979] 1 All ER 898.

sincere motives could still be guilty of the offence if the language in which he expresses himself is deemed to be sufficiently shocking and insulting. Indeed, this would appear to have been the situation in *R v Lemon*.[71]

It should also be noted that the artistic or other merits of the material in question will not provide a defence. Under blasphemy law, there is no equivalent to the public good defence in s 4 of the Obscene Publications Act. The author of the poem in the *Lemon* case was an established poet and a member of the Royal Society of Literature. Despite the aesthetic merit of his poem, he was still convicted.

Breach of the peace

It is no longer necessary for the prosecution to prove that the article has a tendency to cause a breach of the peace.[72] Although, historically, the offence of blasphemy was rooted in the historical need to protect the State from destabilising influences, Lord Scarman described this factor as a reminder of the historical character of the offence rather than an essential element of the offence in modern times.

Protection for the Christian religion only

The law of blasphemy applies only to the Christian religion and, strictly speaking, only to the Anglican religion – it being the established Church within England.[73] Under the present law, it may be accurately said that:

> A person may without being liable for prosecution for it, attack Judaism or Mahomedanism or even any sect of the Christian religion (save the established religion of the country).[74]

In *R v Chief Metropolitan Stipendiary Magistrate ex p Choudhury*,[75] the Court of Appeal confirmed that the offence did not extend to the vilification of the Islamic religion. In its judgment, the Court of Appeal relied on *dicta* of Lord Scarman in *R v Lemon,* in which, having reviewed the existing case law, the Law Lord regretted that it was not open to the House of Lords in a modern multicultural society to extend the limits of the law to cover non-Christian religions. He observed that the offence was 'shackled by the chains of history' and said that Parliament, rather than the House of Lords, must restate the existing law 'in a form conducive to the social conditions of the late 20th century rather than to those of the 17th, 18th or even the 19th century'.

71 See Robertson, G, *The Justice Game,* 1999, Vintage, for more detail.

72 Lord Scarman in *R v Lemon* [1979] 1 All ER 898.

73 *R v Gathercole* (1838) 2 Lewin 237.

74 *Ibid*.

75 *R v Chief Metropolitan Stipendiary Magistrate ex p Choudhury* [1991] 1 All ER 306.

Parliament not having taken up Lord Scarman's suggestion at the time of the *Choudhury* case, it was not open to the court in that case to rule that the law extended to Islam. But the court observed that, even if it were open for them to do so, it would still refrain from ruling in favour of the prosecution on the ground that it would be virtually impossible by judicial decision to set sufficiently clear limits to the offence if it were extended to religions other than the Christian religion. The courts would be called upon to grapple with such metaphysical inquiries as 'what amounts to a religion?'[76] – issues about which the appeal court expressed itself unsuited to judge.

There is at the very least a strong possibility that the current state of English blasphemy law is irreconcilable with the European Convention on Human Rights. Blasphemy laws operate as a restriction on the right to freedom of expression (enshrined in Art 10 of the Convention). Article 14 of the Convention provides that the Convention rights should be applied in a non-discriminatory way. If non-Christian religions are not treated on an equal footing with other religions, there is a real risk that the UK is not complying with its Convention obligations. This point was raised before the court in *Wingrove v UK*, but the European Court declined to reach a view on the question, it not being directly relevant to the facts at issue in the *Wingrove* case.

Reform/abolition?

The Law Commission recommended the abolition of the offence as long ago as 1985,[77] but there has been no indication that this will occur. Since the early 1990s, prosecutions have been almost non-existent, the most recent of which the author is aware of being the private prosecution launched against the author and publisher of the novel *The Satanic Verses*[78] (the *Choudhury* case).

In the wake of the *Choudhury/Satanic Verses* decision, the then Home Secretary, John Patten, issued a statement addressed to a number of influential British Muslims, indicating that 'the Christian faith no longer relies on [the law of blasphemy], preferring to recognise that the strength of their own belief is the best armour against mockers and blasphemers'.[79]

Public prosecutions for blasphemy are likely to remain rare. Yet, despite this lack of activity, it would be foolhardy to regard the law as a dead letter. The offence had lain dormant for 50 or so years before the prosecution in *R v Lemon*. It is interesting to note that both the recent cases – *Lemon* and

76 This would not be the first time that the courts have had to grapple with such questions – see, eg, *Re South Place Ethical Society* [1980] 3 All ER 918, a decision in the context of revenue law.

77 Law Commission, Working Paper No 79.

78 *R v Chief Metropolitan Stipendiary Magistrate ex p Choudhury* [1991] 1 All ER 306.

79 4 July 1989.

Choudhury – were private prosecutions. It is probable that any future prosecutions will follow the same route.

A measure of protection against vexatious private prosecutions has been granted to newspapers under s 8 of the Law of Libel Amendment Act 1888 (but not to other forms of media). The consent of a judge in chambers must be obtained before any such prosecution can be instituted. Such consent will only be forthcoming if the criteria set down in the Act are met. These criteria were set out in Chapter 3 in relation to criminal libel.

The sanctions for blasphemy

Blasphemy is triable on indictment. It carries penalties of an unlimited fine and/or imprisonment. In *R v Lemon* (a case heard in the late 1970s), fines of £1,000 and £500 were imposed on the editor of, and the periodical in which, the offending poem appeared. At trial, a suspended sentence of nine months' imprisonment was imposed on the editor, but this sentence was later quashed by the Court of Appeal.

SEDITIOUS LIBEL

The common law offence of seditious libel carries criminal liability. Like the law of blasphemy, it is an offence rooted in history. The last prosecution for seditious libel was a private prosecution in 1991.[80] It concerned the novel *The Satanic Verses*, in which it was alleged that the author and publishers of the novel were guilty of seditious libel in that the novel had raised widespread discontent and dissatisfaction amongst the Muslim population of England and Wales. The court cited with approval the Canadian case of *Boucher v R*,[81] which held that in order for there to be a seditious libel, there must be a *seditious intention* on the part of the publisher or author. Mere proof of an intention to promote feelings of ill will and hostility between different classes of subject will not alone establish a seditious intention. *The intention must be founded on an intention to incite violence or to create public disturbance or disorder against the Crown or institutions of government*.[82]

The prosecution in the *Choudhury* case was dismissed, because the prosecution could not prove that the author had intended to attack, obstruct or undermine public authority.

80 *R v Chief Metropolitan Stipendiary Magistrate ex p Choudhury* [1991] 1 All ER 306.

81 *Boucher v R* (1951) 2 DLR 369.

82 Persons holding public office or discharging a public function of the State would fall within this definition of the institutions of government.

The Law Commission has recommended the abolition of the offence of seditious libel.[83] In practice, prosecutions for seditious activity are more likely to be commenced by the State under public order legislation rather than under this offence. The danger for the media lies in the commencement of private prosecutions, although such prosecutions are likely to be dismissed on the same grounds as defeated Mr Choudhury's attempted prosecution, namely, an inability to show an intention to attack a public authority.

Where prosecutions are brought against the press, it is likely that the requirements of s 8 of the Law of Libel Amendment Act 1888 will have to be met. These were discussed in Chapter 3 in relation to criminal libel.

BROADCASTERS AND TASTE AND MORALITY

The Independent Television Commission (ITC) programme code and the Broadcasting Standards Commission (BSC) code contain provisions regulating the taste and decency of material broadcast on television. The parties to whom the codes apply and the sanctions for breach are considered in Chapter 16. There are no equivalent provisions in the Code of Practice which is enforced by the Press Complaints Commission.

Viewers may complain to the ITC or the BSC about material which they find offensive (including the use of bad language and sexual portrayal). The ITC may also consider of its own initiative whether material broadcast by its licensees is in breach of its code. It should be remembered that the codes are not law. A broadcaster might be in breach of the Codes of Practice, but that does not mean that it has committed an unlawful act. Conversely, it is possible that a broadcaster might behave unlawfully, yet not be in breach of the Codes.

83 Law Commission, *Treason, Sedition and Allied Offences,* Working Paper No 72.